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Supreme Court of the United States

OCTOBER TERM 1947

No. 790

FRANK CAMPBELL LITTLETON, *Petitioner,*

vs.

DAVID N. RUST, ET AL., *Respondents.*

IN THE MATTER OF FRANK CAMPBELL LITTLETON,
Farmer-Debtor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROBERT H. McNEILL,
Attorney for Petitioner.

Of Counsel:
McNEILL & FULLER,
T. BRUCE FULLER.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI.

The petitioner, Frank Campbell Littleton, Farmer-Debtor, prays that a writ of certioari issue to review the judgment of the United States Circuit Court of Appeals, for the Fourth Circuit in the above entitled case.

Statement.

Petitioner, farmer-debtor, owner of about 1,800 acres of valuable farm land, filed his Petition on June 18, 1941, under the provisions of the Frazier-Lemke Act of March 3, 1933, C. 204, § 1, 47 Stat. 1470; Act of August 28, 1935, C. 792, 39 Stat. 942 and further amendments as it now

appears in 11 U. S. C. § 203, 11 U. S. C. A. § 203 (R. 1, 2; Appendix), and attached thereto a full statement of all his debts known to him, the names and places of residence of his creditors, and a schedule and inventory of all his property. (R. 2, 5, 6)

Petitioner's matter was referred to John F. Kincaid, acting Conciliation Commissioner, appointed by the District Court of the United States for the Eastern District of Virginia, *who was not then or thereafter a member of the Bar,* as required by said Act of March 3, 1933 (Id.), and Act of June 22, 1938, C. 575, § 1, 52 Stat. 857, 11 U. S. C. A. § 63. Said Kincaid was first appointed on May 28, 1937. His term expired on May 28, 1938 (R. 103). He was again appointed on December 13, 1938, for a term of one year from May 28, 1938 (R. 103, 104), and on May 15, 1939 for a term of one year from May 28, 1939 (R. 104, 105), and on April 3, 1941 for a term of one year from April 4, 1941 (R. 105, 106), and on May 1, 1942 for a period of one year from May 1, 1942 (R. 106, 107), and each subsequent year, except as hereafter mentioned, for the period involved herein.

Each order entered by the Court provided,—

> "And the said Kincaid, before entering upon the discharge of said office, shall take the oaths prescribed by law, and enter into and acknowledge a bond before this Court, in the penalty of Five Hundred Dollars ($500.00), payable and conditioned as the law directs." (R. 103-109)

The above provision was not complied with by Kincaid until May 23, 1946. (R. 95-99)

On August 27, 1941 in a meeting with the creditors, their attorneys, and Kincaid,—depositions were taken and the proposal for a composition was offered by the debtor to the creditors, viz.:

> "• • • *The debtor further proposed to sell sufficient land to pay off and discharge the debt secured by the deed of trust.*" (Italics ours) (Report of John F. Kincaid, Conciliation Commissioner.) (R. 7-9)

The above proposal, which if accepted, would have paid the creditors in full, was rejected by a majority in amount and numbers, and said Kincaid. (Id.)

After petitioner's proposal was rejected, he filed an Amended Petition on December 17, 1941. (R. 5, 6)

At the time the petition was filed in 1941, petitioner owed approximately $182,730.70 and his property was appraised at $221,499.60 by appraisers appointed by Kincaid. (R. 12-15)

Kincaid's term of office for one year expired on April 4, 1942. He was again appointed on May 1, 1942 for a term of one year from that date, so there was no conciliation commissioner from April 4 to May 1, 1942. (R. 105-107)

On *April 14, 1942,* said Kincaid, acting as Conciliation Commissioner, although his term expired on *April 4, 1942* as shown above, entered an order setting aside property for a period of three years. (R. 12-14)

The Court did not act on the above order for almost two years, and on January 19, 1944 an order was entered approving Kincaid's order of April 14, 1942. (R. 56)

On November 10, 1945, the Court admitted its mistake and filed a Memorandum in which it stated,—

> "1. The Court was without power to enter that part of the Order of January 19, 1944, which made the three year stay effective as of April 14, 1942 * * *.
>
> An order may be presented after reasonable notice (1) providing for a stay of all proceedings by any creditor of the debtor for a period of three years, effective January 19, 1944: * * *" (R. 56, 57)

On July 1945, the debtor again petitioned the Court for permission to sell certain real estate, timber and box wood trees not necessary for farming operations, but his petition was not approved. (R. 51-54)

Petitioner on April 12, 1945, filed a petition in the District Court stating that he desired to redeem his property and in order to accomplish such redemption that there be a determination by the Court, after hearings, of the exact

amounts due his creditors, and the names of the creditors. (R. 31-33) The petition was not acted on until November 10, 1945, when it was denied. (R. 56, 57)

A similar request was denied in January 17, 1947. (R. 70)

Kincaid's office having expired on May 4, 1945, he failed to take the oath of office or furnish bond as required by the law until July 16, 1946, at which time the Court approved Kincaid's appointment retroactive from May 4, 1945. (R. 94-99)

On August 25, 1947, the Court entered an order appointing trustees, and for the sale of petitioner's property (R. 76-80), and for the property to remain under the jurisdiction of the Court and Kincaid until the sale (R. 79), although Kincaid's office expired on May 4, 1947.

Petitioner's motion to review, reconsider, set aside and rescind the above order was denied. (R. 81-89)

Since filing the petition in 1941, petitioner has paid on his original debts $33,434.60, and rent in the sum of approximately $38,010.00, out of which there has been paid $28,349.00 as interest (slightly over 4 per cent on the first mortgage indebtedness). The rental paid by petitioner since October, 1942 is $7,600.00 per year (R. 13), and paid many thousands of dollars for the upkeep and improvement, which should have been paid out of the rent.

The second trust holders are not pressing petitioner and agreed to withhold any action until the petitioner has worked out a plan within a reasonable time to rehabilitate himself on a permanent basis. The holders of the First Trust notes in the sum of $110,000.00 are the only parties who are opposing petitioner.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(a) and 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA §§ 344(b), 347(a)) and involve the construction of Section 75 of the Bank-

ruptcy Act of March 3, 1933, C. 204, § 1, 47 Stat. 1470, Act of August 28, 1935, C. 792, 49 Stat. 942, 11 USCA, § 203.

Judgments Below.

The Order of the District Court entered on August 15, 1947 is set out in the Record on pages 76-80.

Petitioner's motion and affidavit to review, set aside and rescind the above order was denied. (R. 81)

The Opinion of the Circuit Court of Appeals, for the Fourth Circuit, affirming the decision of the District Court on March 16, 1948, is set out in the Record on pages 126, 127.

Questions Presented.

The Circuit Court of Appeals in affirming the District Court,—

1. Has decided an important question of federal law which has not been, but should be, settled by this Court.

2. Has decided a federal question in a way probably in conflict with applicable decisions of this Court, and the Appelate Courts of the U. S.

3. Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. That there exists a conflict of opinion between the opinion of the Fourth Circuit Court of Appeals in this case and the opinion of other Circuit Courts of Appeals on the same questions.

Reasons for Granting the Writ.

1. The decision (R. 126, 127) of the Court below in failing and refusing to hold that the District Court erred in denying petitioner's request to sell sufficient property to pay his debts (R. 7-9; 51-54) which were far less than the

appraised value, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and in failing to construe the Act liberally to give the debtor full measure of the relief afforded by Congress, is in conflict with the decisions of this Court and decisions of other Circuit Courts. *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U. S. 180; *Wright* v. *Logan*, 315 U. S. 139; *Borchard* v. *California Bank*, 310 U. S. 311, 60 S. Ct. 957, 84 L. Ed. 1222.

2. The decision (R. 126, 127) of the Court below in failing and refusing to hold that the District Court erred in failing to follow procedure which the statute defines, by appointing a Conciliation Commissioner who was not a member of the Bar, from December 1938 to May 1947, and in permitting and approving said Commissioner to act without taking the oath of office and furnishing bond, and to act during the periods after his term had expired, were violations of Section 203(a), 11 U. S. C. A., Section 63, has decided an important question of federal law which has not been decided, but should be settled by this Court, or is in conflict with *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U. S. 180, 187, and *Borchard v. California Bank*, 310 U. S. 311, 317, 318, and *in re Guaranty Trust Co., et al.*, 25 F. Supp. 265.

3. The decision of the Court below in failing and refusing to hold that the District Court erred in its memorandum of November 10, 1945 in making retroactive the three year stay period effective as of January 19, 1944, instead of the date of its order after November 10, 1945, if any order was entered, is in conflict with the decision in *Paradise Land & Livestock Co.* v. *Federal Land Bank*, 118 F. 2d 215, 217, 218, and 11 U. S. C. A. § 203 (S-2) Page 11.

4. The Court below in failing and refusing to hold that the District Court erred in denying petitioner's petition dated April 12, 1945, to determine the amount necessary

for him to pay into Court in order to pay in full the claims of all his creditors and their names in order to secure a release of his property (R. 31-33; 56, 57) is contrary to the provisions of the Frazier-Lemke Act, Sec. 203 11 USCA.

5. The Court below in failing and refusing to hold that the District Court erred in failing and refusing to require the Conciliation Commissioner to assist petitioner, and to use the necessary part of the rental for the upkeep of petitioner's property is in violation of subsections (Q) and (S) of Sec. 203, Title 11 USCA, and in conflict with the decisions of this Court and the U. S. Court of Appeals. *In re Miller,* 111 F. 2d 28; *in re Mahaffey,* 129 F. 2nd 292; Petitioner was entitled to have said Act liberally construed to give him the full measure of the relief afforded by Congress. *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180; *Wright* v. *Union Central Life Co.,* 311 U. S. 273; *Beecher* v. *Federal Land Bank,* 153 F. 2d 987.

6. The decision of the Court below in failing and refusing to hold that the District Court erred in appointing trustees and ordering the property sold for the reasons stated above, is in conflict with *Borchard* v. *California Bank,* 310 U. S. 311, 317, 318, and the Frazier-Lemke Act 11 USCA Sec. 203.

For the reason stated above, it is respectfully submitted that this petition for writ of certiorari be granted.

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Supreme Court of the United States

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IN THE MATTER OF FRANK CAMPBELL LITTLETON,
Farmer-Debtor.

BRIEF IN SUPPORT OF WRIT.

The opinions in the courts below have not been officially reported. The District Court Order is printed on pages R. 76-80, and the Court below opinion is printed on R. 126, 127.

The Jurisdiction, Statement of the Case, and Questions Presented are set out in the foregoing Petition and are adopted and made a part hereof by reference.

Errors to be Urged are set out below, and included in the Reasons for Granting the Writ in the foregoing Petition and are adopted and made a part hereof by reference.

Argument.

Error I.

The Court below erred in failing and refusing to hold that the District Court was required by Statute to permit petitioner to sell sufficient property to pay his debts.

Petitioner filed a petition on *June 18, 1941* under the provisions of the Frazier-Lemke Act, (see Appendix) as farmer-debtor, and attached thereto full statement of all his debts and a schedule and inventory of his property. (R. 7-9) His debts amounted to $182,730.70, due to financial reverses not connected with farming. (R. 7) He is the owner of about 1,800 acres of valuable farm land and valuable buildings and equipment located near Aldie, Virginia. This property is worth many times the amount of the debts and was appraised by appraisors appointed by the purported Conciliation Commissioner at $221,499.60 (R. 12-15).

On August 27, 1941, a meeting was held with the creditors and their attorneys and the purported Conciliation Commissioner. Depositions were taken and a proposal for a composition was offered by petitioner to the creditors and petitioner offered, among other things, advantageous to the creditors,—

> "* * * to sell sufficient land to pay off and discharge the debt secured by the deed of trust * * *. (Report of John F. Kincaid, Conciliation Commissioner (R. 7-9).

The proposal was rejected by a majority of the creditors in interest and the Commissioner (R. 7-9).

On April 12, 1945, petitioner filed a petition in the District Court stating that he desired to redeem his property and in order to accomplish such redemption, he requested the Court for a hearing in order to determine the exact amounts due his creditors, and the names of the creditors, as certain listed creditors had informed him that they were

not creditors. The petition was not acted on by the Court until November 10, 1945, at which time it was denied.

In July, 1945, the petitioner again requested permission to sell certain real estate, timber and boxwood trees, not necessary for farming and to apply the proceeds therefrom on his debts, but his petition was denied. (R. 51-54).

Such actions by the District Court were contrary to the Frazier-Lemke Act, and the cases in this Court.

11 U. S. C. A., Section 203 (*Q*) reads as follows:

> "A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and *in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.*" (Italics ours).

Other applicable sections are found in the Appendix.

In *Wright* v. *Logan*, 315 U. S. 139, the Court stated,—

> "* * * the Act must be liberally construed to give the debtor the *full measure of the relief* afforded by Congress * * * lest its benefits be frittered away by narrow formalistic interpretations which disregards the spirit and letter of the Act * * *. (Italics ours)
>
> (See also *John Hancock Mutual Life Ins. Co.* vs. *Bartels*, 308 U. S. 180; and *Borchard* v. *California Bank*, 310 U. S. 311).

The duties laid upon the Court by the above language could not be broader, and while the particular duties were vested in the Conciliation Commissioner to render appropriate aid to farmer-debtors, it was equally the duty of the Court to see that such aid was rendered.

The record in this case discloses that not only did the Conciliation Commissioner fail to render the aid contemplated by the above Statute, but throughout this proceeding either showed absolute indifference to the needs of farmer-debtor, or active opposition.

1. During the progress of this proceeding the farmer-debtor needed,—and the Statute accorded him,—the services of the Conciliation Commissioner and the Court for definite and express means of rehabilitation as shown by the record, to wit: the farmer-debtor applied for permission to sell portions of his real estate to pay all of his debts. This petition was never given sympathetic or favorable consideration, but was categorically denied. (R. 7-9)

2. The farmer-debtor desired to sell timber off of his farms and submitted his request to the Conciliation Commissioner and the Court, and this petition was ignored or failed to receive any consideration. (R. 51-54)

3. The farmer-debtor applied to the Court for an accounting as to what he required in the way of monies to pay his indebtedness and this accounting—whereby he could have known exactly how much money he needed to pay off his obligation—was likewise given unfavorable consideration. (R. 56, 57, 70)

4. It was the Conciliation Commissioner's duty to maintain the property of petitioner from the rentals paid by him ($7,600 per year) and also the taxes. (11 USCA § 203-S)

Complete failure to maintain the property from the rentals is shown by the record, and the farmer-debtor was forced to use his own personal means to liquidate these items.

5. The Conciliation Commissioner actually refused to communicate with, or deal with, farmer-debtor on vital subjects involved in farmer-debtor's rehabilitation.

6. The Conciliation Commissioner failed and refused to suggest or cooperate in any plan for refinancing the indebtedness of plaintiff.

It will thus be seen that every duty owing to the farmer-debtor under the Statute was ignored and active hostility

substituted therefor. Hence, it is seen that the purpose of the Act, providing for relief to the farmer-debtor, utterly failed from the time he filed his petition until the present time;—not only has he not had three years of time for rehabilitation, under the liberal provision of the act,—but has had no period of time whatever during which he has had the cooperation and assistance of qualified officials of the Court, as contemplated by the Statute.

From the above, it will be seen that the findings of the Fourth Circuit herein that the bankrupt has "had every advantage under the law that the Statute contemplates and more" is so contrary to the record as to require review and correction by this Court. In fact, based upon the record, it is very difficult for counsel to understand how the Fourth Circuit Court of Appeals could have so misconceived the record and documents making it up as shown above.

Error II.

The Court below erred in failing and refusing to hold that it was the duty of the District Court to follow the procedure which the statute defines by appointing a Conciliation Commissioner who was a member of the Bar, and to require him to be sworn in and give proper bond before entering upon the discharge of the duties of said office.

The facts show that John F. Kincaid was appointed Conciliation Commissioner on *May 28, 1937* for a term of one year. Section 75 A (11 USCA Sec. 203) provides that "no individual shall be eligible for appointment as a Conciliation Commissioner unless he is eligible for appointment as a referee * * *." On *May 28, 1938 said Kincaid's term of office expired.* (R. 103). The Act of June 22, 1938, C. 575, Sec. 1, 52 Stat. 857, 11 USCA Sec. 63, provided that,—

> "Individuals shall not be eligible to appointment as referee unless they are, * * * (5) members in good

> standing at the Bar of the District Court of the United States in which they are appointed: Provided, however, that this requirement shall not apply to referees holding office on the date when this amendatory act takes effect.* * *"

On *December 13, 1938,* about six months after the date when the above amendatory act took effect, the District Court again appointed said Kincaid, who was not and is not a member of the Bar, (disregarding the above act) as Conciliation Commissioner, and attempted to justify such action by making the appointment retroactive as of May 28, 1938. (R. 103, 104)

The Court below overlooked above facts in its decision (R. 126, 127).

The District Court continued from year to year to appoint Kincaid Conciliation Commissioner in violation of the above act (R. 103-110). Each order entered by the District Court specified that said Kincaid "before entering upon the discharge of said office, shall take the oaths prescribed by law and enter into and acknowledge a bond before this Court payable and conditioned as the law directs." This provision as to oaths and bonds was not complied with by Kincaid until May 23, 1946 (R. 103-110).

Title 11 USCA Sec. 64 requires that,—

> "Referee shall take the same oath of office as that prescribed for judges of the United States Courts. July 1, 1898, C. 541, Sec. 36, 30 Stat. 555."

Title 28 USCA Sec. 372 provides that,—

> "* * * The Justice of the Supreme Court, the Circuit Court Judges, and the District Judges appointed shall take the following oath *before they proceed to perform the duties of their respective offices:* * * *". (our italics).

The above provisions of the statute are mandatory and renders the actions of the Commissioner of no force and effect. (*Parker, et al.* v. *Overman,* 18 U. S. 137, 143, 15 L. Ed. 318, 320).

In *John Hancock Mutual Life Insurance Co.* v. *Bartels,* 308 U. S. 180, 187, this Court stated that it is concerned "with the duty to follow procedure which the statute defines and the District Court failed to provide."

In *Borchard v. California Bank,* 310 U. S. 311, this Court stated,—

> "The bank, at any time, could have obtained action by the Conciliation Commissioner and the Court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens * * *. Reversed and remanded."

For the reasons stated above, and under the above decisions, this case should be reversed and remanded.

Error III.

The Court erred in holding that the three year stay period ran from January 14, 1944.

Said Kincaid purported office as Conciliation Commissioner expired on *April 4, 1942.* (R. 105, 106) He was again appointed on *May 1, 1942.* (R. 106, 107) On April 14, 1942 Kincaid, while no longer in office, entered an order setting aside property of petitioners for a period of three years. (R. 12-14) The District Court did not act on the above order for almost two years. On January 10, 1944, the Court entered an order approving Kincaid's order of April 14, 1942. On *November 10, 1945* the District Court admitted its mistake and filed a memorandum in which it stated,—

> "* * * 1. The Court was without power to enter that part of the order of January 19, 1944, which made the three year stay effective as of April 14, 1942. * * *
>
> "* * * An order may be presented after reasonable

notice (1) providing for a stay of all proceedings by any creditor of the debtor for a period of three years, effective January 19, 1944; * * *" (R. 56, 57)

The Court made the same error in its memorandum of November 10, 1945, and its order subsequent thereto if any order was entered in attempting to order the three year stay period retroactive, effective as of January 19, 1944. *Paradise Land & Livestock Co.* v. *Federal Land Bank,* 118 F. 2d 215, 217, 218, and 11 USCA Sec. 203 (S-2); *Borchard* v. *California Bank, supra.*

No stay period as provided by the statute has been ordered by the Court.

"Since the stay order fixes the beginning of the three-year period during which the debtor must pay rent, and the beginning of the maximum period within which the debtor must pay the first year's rental, we are of the opinion that the court was without power to give retroactive effect to its order of August 7, 1940, and start the running of the three-year period as of September 8, 1938, and place the debtor in default for nonpayment of rent for 1938. We conclude that the three-year period must be held to have commenced on April 1, 1940; that the debtor's obligation to pay rental commenced on April 1, 1940; and that the debtor should be required to pay rental for 1940 and during the remainder of the three-year period in accordance with the order of the Conciliation Commissioner of April 23, 1940.

"The order appealed from is reversed and set aside and the cause remanded with directions to proceed in accordance with this opinion."

Paradise Land & Livestock Co. vs. *Federal Land Bank,* 118 F. 2d. 218

The Court also erred in delaying its decision and approving on January 19, 1944, and November 10, 1945 the Acting Commissioner's report of April 14, 1942, as his office expired on April 4, 1942. (R. 105, 106)

As stated in *Guaranty Trust Co. et al.,* 25 Fed. Supp. 265,—

"* * * At the end of the term of a referee, it would seem that the approved method has been to reenter partially administered cases to another referee or a successor referee of the same district. Kinkead *v.* J. Bacon & Sons, 6 Cir. 230 F. 362, 369, certiorari denied, 240 U. S. 680, 36 S. Ct. 728, 602 Ed. 1234. Thus, the clear indication is that Congress intended the referee should not have power if his term hadd expired * * *."

Error IV.

The District Court erred in denying petitioner's request for a hearing to determine the amount necessary for him to pay into Court.

On April 12, 1945, petitioner filed with the District Court a petition stating his intention to redeem all of his property and requested a hearing to determine the exact amount due his creditors and their names, as certain creditors, stated they were not the owners or holders of First Trust Notes named in the claims filed, and there was an uncertainty as to the amount due some creditors, and that some claims scheduled as unsecured claims, were claiming liens on the estate by reason of recorded judgments. (R 31-33). This request was not acted on by the Court until November 10, 1945, at which time the request was denied. (R. 67). A similar request was denied in 1947. (R. 70-71)

As stated in *Beecher* v. *Federal Land Bank,* 153 F. 2d 987 not only was petitioner not afforded the assistance of a legal conciliation commissioner, *but was without aid from the Court for* the above six month period, as well as other periods as shown by the record (R. 56, 57; see Error III above), at which time the Court erroneously refused petitioner's request. (R. 56-57). This is plainly a violation of the Act. *Borchard* v. *California Bank,* 310 U. S. 311; *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 187.

We quote from *Beecher* v. *Federal Land Bank,* 153 F. 2d 987 as follows:

> "We can conceive of but rare cases in which Congress would have regarded the Conciliation Commissioner as more needed than here. * * * *For considerable time there was no conciliation commissioner.* For many months there has been a vacancy in the resident federal judgeship. Without funds for counsel and against skilled counsel, appellant was unable to resist the order appointing a receiver, taking from the farmer the management of the fruit trees he had developed into the bearing orchard, an order which, on the record, we have affirmed, as modified by our decision in 153 F. 2d 987. Not only has the distressed farmer been for considerable periods without the aid of a conciliation commissioner, but the court below has refused him the allowance of fees for an attorney, a refusal which again, in the state of the record, we have upheld." (Italics ours).

Error V.

The District Court erred in failing and refusing to appoint a legal Conciliation Commissioner to assist petitioner as required by the Act. (11 USCA 203 (Q))

It is evident from the record that the District Court violated the mandatory provisions of the Frazier-Lemke Act, 11 USCA § 203 and provisions of the Bankruptcy Act as shown under the point above; and in appointing Kincaid, not a member of the Bar, who was hostile to petitioner from the time he filed his petition. He was under the control of David N. Rust, who owned most of the first trust notes on petitioner's property (R. 21), and who, against petitioner's protest, is purported to have carried the insurance to protect petitioner's property. *Petitioner does not know at this time or at any time whether his property is insured,* and although respondents say they carry sufficient insurance, through said Rust, they refuse to give petitioner the schedule of the insurance and on which buildings it applies.

On June 24, 1943, January 20, 1945, March 12, 1945, and March 18, 1947, petitioner filed exceptions in which he stated that he had written to said Kincaid, Conciliation Commissioner in regard to the insurance policies which he was informed were expiring. Said Kincaid refused to give the above information although petitioner offered to pay for the insurance out of his own funds (R. 28-30; 73, 74.)

On June 24, 1943, petitioner again filed exceptions to said commissioner's report and, as petitioner was not familiar with the law, and was without representation of an attorney, he requested permission of the Court to appear in person (R. 82-83). As stated in *Beecher* v. *Federal Land Bank,* 153 F. 2d 987, petitioner was not accorded the assistance of a conciliation commissioner or the prompt action of a Court, as required by the statute, which this Court stated in *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 187, is its duty to see that such procedure is followed.

On July 12, 1945, petitioner again filed objections to the Commissioner's Report in which he gave notice that he would proceed to liquidate the estate. (R. 48-50)

In January, 1947, he filed a petition objecting to the Commissioner and requested a determination of the claim, but no action was taken. (R. 72-73). Certain holders of the first trust claimed that petitioner is concerned only in paying the appraised price of his property, $221,499.60, and not the smaller sum due the creditors amounting to approximately $175,000.00 including interest. (R. 36; 14, 15; 18, 19, 20, 25, 26, 44, 45, 59, 63, 68)

On March 18, 1947, and April 10, 1947, petitioner filed exceptions and objections to the Commissioner's failure to keep the property in repair, his refusal to disclose which buildings were covered by insurance and the amounts, and his lack of qualifications necessary for the office. (R. 73-75)

The objections petitioner and his attorney filed as to the Commissioner's action had no effect. As he was not a

legal Commissioner, and had no power to appoint appraisers, no exceptions were required to be filed with him. *Corey* v. *Blake*, 136 F. 2d 162.

Of course, unless the appraisers were legally appointed and qualified the limitations of time could not run against petitioner, hence it is necessarily true that there having been no legal appraisement, there must be one before the time limitation of three (3) years can begin to run, hence it was error in the Circuit Court of Appeals to hold that the farmer-debtor in this case had had all the time allowed him under the law, "and more".

Corey v. *Blake*, 136 F. 2d. 162 states:

> "* * * Thus, upon the filing of appellants' amended petition, it became the duty of the commissioner to appoint three disinterested appraisers. The appointment should have been made in writing, and each appraiser *should have been sworn.* * * *" (p. 164)
>
> * * * * * *
>
> " 'The court presented to the respective counsel the official appraisal returned in this matter, showing the appraisal as is on file herein. Both the secured creditor present (appellee) and the debtors (appellants), through their respective counsel, stipulated that the appraisal returned by the official appraisers appointed by this court, be and is the value of the property of the debtors, and the court thereupon approved and adopted said appraisal.' " (p. 165)
>
> * * * * * *
>
> "But, although we may not review that approval, we may consider its effect, if any. We think it had no effect whatever; for since Moore, Chargin and Garrod, so far as the record shows, were never appointed as *sworn appraisers*, the paper they signed could not, we think, be deemed an appraisal within the meaning of sub-section s: nor do we think the commissioner's approval could or did transform the paper into something it was not." (Italics ours). (p. 165)
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"Judgment reversed and case remanded with directions to reverse the commissioner's order of April 18, 1942, and require the commissioner to proceed in accordance with subsection s of Sec. 75 of the Bankruptcy Act." (p. 167)

Error IV.

The District Court erred in appointing trustees and ordering the property sold for the reasons stated in the proceeding points.

Here the creditors could have obtained payment in 1941 (Error I), and could have obtained proper action by a legal conciliation commissioner and the Court, in accordance with the Statute, but chose to have Kincaid act as a conciliation commissioner, contrary to the provisions of the statute, as held in *Borchard* v. *California Bank,* 310 U. S. 311 this case should be reversed and remanded.

In addition thereto as stated in Error III above, the three year period did not start to run at the earliest until after November 10, 1945, if at all, as no valid order was entered as required by 11 USCA Sec. 203 (S-2).

Said Kincaid's action from the beginning was hostile to petitioner who refused to assist petitioner as required by subsection (Q), Title 11 USCA Sec. 203. In 1941 he recommended that petitioner's proposal to sell part of his property to pay his debts be rejected (R. 7-9). Numerous exceptions were filed by petitioner, including those of June 24, 1943 as shown in petitioner's affidavit of August 25, 1947 (R. 82), and on July 11, 1945 (48-50). The objections petitioner and his attorney made had no effect, and since respondents chose to follow the disorderly and unauthorized procedure instead of the procedure which the statute defines, they are estopped from claiming that petitioner has received the equivalent to what it prescribes. *Wright* v. *Logan,* 315 U. S. 139, citing *Borchard* v. *California Bank,* 310 U. S. 311.

From the facts stated herein, it is apparent that the lower court erred in its statement that "The Bankrupt has had every advantage under the law that the statute contemplates and more and has delayed his creditors for more than six years in the enforcement of their rights. This, and the additional finding by the court that, "whether the Commissioner possessed the statutory qualifications required as a prerequisite to appointment or not, there can be no question but that he was a commissioner de facto and that his acts as such may not be collaterally attacked.", (R. 126, 127) is in conflict with the decisions of this court in *John Hancock Mutual Life Insurance Co.* v. *Bartels,* 308 U. S. 180, 187 which requires the District Court to "follow procedure which the statute defines", and *Wright* v. *Logan,* 315 U. S. 139, 142 which states "* * * Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes, Cf. *Borchard* v. *California Bank,* 310 U. S. 311, 60 S. Ct. 957, 87 L. Ed. 1222.

It is inconceivable that Mr. Kincaid, the Conciliation Commissioner was either a *de jure* or a *de facto* officer of the District Court when it is conceded:

(a) That he was never a member of the Bar during his many periods of purported service;

(b) That he gave only one bond of $500 and took the oath of office only once—on July 16, 1946 (R. p. 93) although he attempted to administer petitioner's property without so doing and without the qualifications made mandatory by the Act, from June 1941 to August 15, 1947.

Certainly no appointee's act can be valid until he has done the things necessarily required by the power appointing him. His acts are void unless he takes the oath of office and gives the bond required by the order of appointment.

In *Parker et al.* v. *Overman, 18 U. S. Howard,* 137, 15 L. Ed. 318, 320, the Court held,—

Sheriff of the County of Dallas, did not file his Oath as assessor on or before the 10th day of January, as required by law. He did file an Oath on the 15th of March, but this was not a compliance with the law, and conferred no power on him to act, as assessor. On the contrary by his neglect to comply with the law, his office of sheriff became ipso facto vacated, and any assessment made by him in that year was void, and could not be the foundation for a legal sale. * * *"

Conclusion.

The actions of the courts below are based upon the erroneous theory that petitioner had the advantage under the law that the statute contemplates, which is contrary to the facts set out herein, as shown by the record, and contrary to law, as the District Court failed to follow the procedure which the statute defines. (*John Hancock Mutual Life Ins. Co.* vs. *Bartels*, 308 U. S. 187; *Borchard* v. *California Bank*, 310 U. S. 311). As stated in *Wright* v. *Logan*, 315 U. S. 139,—

> "Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes."

Subsection S (3) Title 11 § 203 applies only where the farmer-debtor's property is appraised at less than the amount of his debts, and does not apply here where the appraised value is greatly in excess of the amount of his debts. The position taken by the District Court, Commissioner, and first mortgage note holders was, that petitioner is required to pay into court $221,000.00, *the appraised value*, and in refusing to permit petitioner to sell a portion of his property in order to pay the creditors in full, together with interest. This requirement was the cause of the delay, and the reason *why petitioner has been unable to rehabilitate himself.*

It is therefore earnestly urged that the decision of the Circuit Court of Appeals herein be reversed and the cause

remanded to the District Court with instructions, among other things, to appoint a legally qualified Conciliation Commissioner to aid and assist the farmer-debtor in a plan of rehabilitation including the appointment of legally qualified appraisers, and the accurate ascertainment of the farmer-debtor's indebtedness, and that such Commissioner be instructed to aid and not to hinder the efforts of petitioner to rehabilitate himself and his properties, subject to the supervision and approval of the District Court, for at least the period of 3 years from the time of the appointment and qualification of such Conciliation Commissioner and that, pending such rehabilitation, the Conciliation Commissioner be required to maintain petitioner's property in good condition from the rentals thereof.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

I.

The Frazier-Lemke Farmer-Debtor Act, Section 75 of the Bankruptcy Act of March 3, 1933, C. 204, § 1, 47 Stat. 1470; Act of August 28, 1935, C. 792, 49 Stat. 942, 11 USCA § 203 was amended by Act of March 11, 1944 C. 87, 58 Stat. 113, making the term of office for two years instead of one year. We quote the portions of the Act involved herein:

> "203. Agricultural compositions and extensions—conciliation commissioners; appointment; qualifications; term of office
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> (a) Every United States district court of bankruptcy shall appoint not more than twenty persons in any one district to be known as "conciliation commissioners". One such commissioner shall be appointed from each division or for the territory served by the city where terms of court are held. The court shall designate the territorial district of each such commissioner. A conciliation commissioner's term of office *shall be two years,* but he may be removed by the court if his services are no longer needed or for other cause. *No individual shall be eligible for appointment as a conciliation commissioner unless he is eligible for appointment as referee* and in addition is a resident of the district, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify." (Italics ours)

"*Conciliation commissioner to assist in filing petition and subsequent proceedings without services of attorney*

"(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section."

"Adjudication as bankrupt on failure of proposal; stay of other proceedings against debtor; purchase of property by debtor; application of section to former cases

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semiannually or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That

upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

"(4) The conciliation commissioner, appointed under subsection (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of."

II.

QUALIFICATIONS OF REFEREE.

"63. Same; qualifications

Individuals shall not be eligible to appointment as referees unless they are (1) competent to perform the duties of a referee in bankruptcy; (2) not

holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery or notaries public; (3) not relatives of any of the judges of the courts of bankruptcy or of the justices or judges of the appellate courts of the districts wherein they may be appointed; (4) resident within the territorial limits of the court of bankruptcy and have their offices in the districts for which they are to be appointed; and (5) members in good standing at the bar of the district court of the United States in which they are appointed: Provided, however, That this requirement shall not apply to referees holding office on the date when this amendatory Act takes effect. July 1, 1898, c. 541, § 35, 30 Stat. 555; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 22, 1938, c. 575, § 1, 52 Stat. 857. (11 USCA § 63)"

OATHS.

"64. Same; oaths

Referees shall take the same oath of office as that prescribed for judges of United States courts." July 1, 1898, c. 541, § 36, 30 Stat. 555.

III.

OATH OF UNITED STATES JUDGES.

"(Judicial Code, sec. 257.) Oath of United States Judges. The justices of the Supreme Court, the circuit judges, and the district judges appointed, shall take the folowing oath before they proceed to perform the duties of their respective officers: 'I, ..., do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfuly and impartially discharge and perform all the duties incumbent upon me as ..... according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.' (R. S. § 712; Mar. 3, 1911, c. 231, § 257, 36 Stat. 1161.)" 28 USCA Sec. 372.